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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 753

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, A CORPORATION,
Petitioner
VS.
STATE OF ALABAMA, ex rel. JOHN PATTERSON, ATTORNEY GENERAL

NO. 674 Misc.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Petitioner
VS.
HONORABLE J. ED. LIVINGSTON, CHIEF JUSTICE OF THE SUPREME COURT OF ALABAMA, ET AL.,
Respondents

BRIEF AND ARGUMENT FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI and/or PETITION FOR WRIT OF MANDAMUS

MacDONALD GALLION
Attorney General
State of Alabama
Counsel For Respondent

JAMES W. WEBB
Assistant Attorney General
State of Alabama
Of Counsel

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STATEMENT OF THE CASE

The facts, as set forth in the opinion of the Supreme Court of Alabama, dated February 12, 1959, (Ms. 3 Div. 779) are sufficient for a full determination of the only question properly presented to this Court.

On June 30, 1958, this Honorable Court reversed and remanded for further proceedings "not inconsistent with" the opinion of this Court a decision of the Supreme Court of Alabama. 357 U. S. 449 reversing 265 Ala. 349. The Supreme Court of Alabama having previously denied certiorari on procedural grounds, but having expressed their views as to the merits of the petitioner's allegation of a constitutional right to refuse to divulge membership lists, thereupon set about to review the case, as required in the mandate, and determine all questions within the breast of the Court pursuant to the mandate and the rules of law approved by this Court in its acceptance of certain Alabama authorities, i. e., **Ex parte Boscowitz,** 84 Ala. 463, and **Ex parte Dickens,** 162 Ala. 272.

The Alabama Supreme Court accordingly found, upon careful review of the record before it, that the petitioner had been held in contempt for: "its wilful and deliberate refusal to produce the documents described in the former order of the Court in this cause" (orders dated July 25, and July 31, 1956), not alone for failure to produce membership lists, as alleged by the petitioner. Therefore, applying the rules of **Ex parte Dickens,** supra, as directed by mandate, the Supreme Court of Alabama affirmed the cause. (Ms. 3 Div. 779)

ARGUMENT

JURISDICTION OF THE SUPREME COURT SHOULD NOT BE EXTENDED TO CASES DEVOID OF FEDERAL QUESTION.

The petitioner in this case has requested this Court to assume jurisdiction of this case simply because of the fact that this Court formerly decided one facet of the case, in spite of the fact that there is no longer a Federal question involved for this Court to review. This Court, in its opinion (357 U. S. 449) held primarily:

1. Alabama had misinterpreted its rules as to review of civil contempt by certiorari as opposed to mandamus.

2. The petitioner, National Association for the Advancement of Colored People, could claim the qualified right of secrecy and assembly for its members, in view of its nexus with them provided by the wording of the petitioner's Constitution.

3. In view of possible retaliation alleged by petitioner, the State must show an overriding interest to compel disclosure of petitioner's membership.

4. The State had failed to show such an overriding interest.

This Court accordingly issued to the Supreme Court of Alabama a mandate to proceed with the case in a manner not inconsistent with the opinion.

It must be recalled that the Supreme Court of Alabama had previously denied certiorari and refused to review the record on procedural grounds. 265 Ala. 349. As to that procedural ruling, the Court restated and reinstated, for the benefit of the Alabama bench

and bar, its rule for future cases as to the distinction between certiorari and mandamus. However, as to the case at bar, the Alabama Court proceeded to review the record in accordance with this Court's mandate.

In its review, the Alabama Supreme Court first took up the proposition of prima facie right to refusal on petitioner's part (**Ex parte Boscowitz,** 84 Ala. 463). It found, in view of this Court's opinion, that error existed in that portion of its previous opinion in which it held, for the future guidance of the parties, that the petitioner had no prima facie right to refuse to divulge its membership on request of the State. Accordingly, the Supreme Court of Alabama ruled that the petitioner did have a qualified prima facie right, subject to overriding interest of the State, but which the State had failed to sufficiently establish.

The second proposition taken up by the Alabama Court in its review were the orders and facts apparent on the face of the record before them. The order of the Circuit Court held the petitioner in contempt for failure to produce the books, records and documents previously requested. This order was apparent on the face of the record and made a part of the petition. The petitioner had alleged that all of the documents, with exception of membership lists, were offered, however, the record affirmatively shows to the contrary. Accordingly, the Supreme Court of Alabama, in following the rules of **Ex parte Dickens,** 162 Ala. 272, approved by this Court previously, affirmed the cause.

It should be noted that the position taken by the Alabama Court is not novel or unreasonable. It is as old as the common law itself and well supported by

Alabama authority. The Supreme Court of Alabama on certiorari simply may not upset a finding of fact by the trial court. This Court approved the **Dickens** case, supra, specifically, and a portion of that case reads as follows:

> "Following the rules above stated, the Chancellor has found the facts that said Dickens has not, in good faith, obeyed the orders of the court, but, on the contrary, has filed a false and fraudulent account; and **we must take his finding as being correct.** Those being the facts, said Dickens was properly adjudged to be in contempt, and it was within the power and jurisdiction of the court to order that he be imprisoned until he should comply with the orders of the court." (Emphasis supplied).

Petitioner contends, in effect, that where a mandate has once issued, this Court should thereafter review by certiorari or mandamus each subsequent ruling by the lower court contrary to the petitioner's likes, and thus forever retain jurisdiction of the cause. It further cites **City National Bank v. Hunter**, 152 U. S. 512 and **Re Metropolitan Trust Company**, 218 U. S. 212. These cases, however, hold quite contrary to the petitioner's views. Both are quite clear that mandamus is an incorrect remedy to compel the court below to decide a particular case in a particular manner, and that unless the mandate of this Court was of such a nature as to leave nothing to the judgment or discretion of the State Court, this Court will not now review by any such remedy. In fact, this Court, in its discussion as to the writ of mandamus, has gone further and held that mandamus, in the main, is restricted to situations where ministerial duties of a non-discretionary

nature are involved. Only where the matter is peradventure clear, where the agency is clearly derelict in failing to act, where the inaction or action turns on a mistake of law, then may the relief be afforded. **Panama Canal Company v. Grace Line,** 356 U. S. 309.

Clearly, in the case at bar, the Supreme Court of Alabama was left with discretion to act on the case. In fact, in view of its refusal to review the case in its first instance, the Alabama Court had to act and review the case in this instance on mandate, otherwise it becomes a nonentity. The position of the petitioner as to its motions to the Supreme Court of Alabama to forward the mandate to the Circuit Court without further ado would reduce the State Supreme Courts to mere forwarding agencies with no power, jurisdiction, or discretion, a mere rubber stamp. Such a position is untenable.

Could then certiorari be granted in this case? We think not. The review by the Supreme Court of Alabama was reasonable, fair, and based on sound principles of law. The mandate of this Court was followed to the letter and carefully attended in its most minute detail. The mandate directed the Supreme Court of Alabama to review the record by certiorari, keeping in mind that the petitioner, for the purposes of this appeal, did not have to produce its membership lists. This Court further approved **Ex parte Dickens,** supra, as a model or guide for review by certiorari, and, further held the other matters sought by the motion to produce not subject to constitutional objection, viz., legitimate items of inquiry. Accordingly, the Supreme Court of Alabama could do no more than affirm.

The United States Supreme Court has previously stated that on cases after mandate, where the case has

been disposed of devoid of Federal question, this Court will not review the cause. **Naim v. Naim,** 350 U. S. 985.

The respondent has never agreed, and does not now agree that the petitioner has complied with the trial court's order to produce with the exception of membership. The respondent, in fact, specifically denies that the petitioner has produced or offered to produce in all aspects except for lists of membership. As a result of its "brazen defiance," as stated by the Alabama Supreme Court, of the entire order to produce, the petitioner was held in contempt, (**Ex parte National Association for the Advancement of Colored People,** 265 Ala. 349, 352), and any proposition to the contrary is pure assumption on the petitioner's part, allegations based on imagination, not fact, and completely unsupported by the record.

One further matter deserves attention before a conclusion of argument, i. e., the continuous reference by petitioner to its "punishment" of contempt. The contempt in this case is a civil contempt and not a criminal contempt; the petitioner is being coerced, not punished in the strictest sense of the word. **United States v. United Mine Workers of America,** 330 U. S. 258; **Ex parte National Association for the Advancement of Colored People,** 265 Ala. 349. Certainly the petitioner has not been exiled as a punishment of contempt, as alleged, (page 9 of petition) and that portion of the petition is res judicata. **National Association for the Advancement of Colored People v. State of Alabama,** 357 U. S. 449.

CONCLUSION

The totality of the petition is that because the Alabama Supreme Court followed the mandate and

reviewed the case instead of immediately forwarding the mandate to the Circuit Court of Montgomery County, Alabama, as requested by the petitioner in its motions, (the petitioner filed no briefs) this Court should, therefore, in effect, ignore the State Supreme Court. Such a position is untenable, and, for the foregoing reasons, this petition should be denied.

Respectfully submitted,

MacDONALD GALLION
Attorney General
State of Alabama
Counsel for Respondent

JAMES W. WEBB
Assistant Attorney General
State of Alabama
Of Counsel

CERTIFICATE OF SERVICE

I, MacDonald Gallion, Attorney for the Respondent, The State of Alabama, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27 day of March, 1959, I served copies of the foregoing brief in opposition on Robert L. Carter, 20 West 40th Street, New York, New York, by placing two copies in a duly addressed envelope, with air mail postage prepaid, in the United States Post Office at Montgomery, Alabama, and on Arthur D. Shores, 1630 Fourth Avenue, North, Birmingham, Alabama, by placing a copy in a duly addressed envelope, with first class postage prepaid, in the United States Post Office at Montgomery, Alabama.

I further certify that this brief in opposition is presented in good faith and not for delay.

Mac Donald Gallion

MacDONALD GALLION
Attorney General
State of Alabama
Montgomery, Alabama